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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1090

WOO CHENG HWA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Woo Cheng Hwa petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit filed on December 9, 1966, denying review of an order of the Board of Immigration Appeals dated May 25, 1966 (R. 22, 29, 48).

OPINION BELOW

The opinion of the Court of Appeals is dated December 9, 1966, is not reported and is set forth in Appendix A (R. 29).

JURISDICTION

The judgment of the Court below is dated and was entered (R. 49) on December 9, 1966 (Appendix B). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where the Attorney General is authorized to confer preference status as conditional entrants under the quota limitations upon alien refugees in non-Communist countries [8 U.S.C. 1153(a)(7)] is it proper for him to issue regulations precluding the issuance of such status to refugees in the United States?

2. Where the Attorney General is authorized to grant permanent residence (adjustment of status) to alien refugees from Communism who have been physically present within the United States for two years [8 U.S.C. 1153(a)(7)], is he limited by the provisions of 8 U.S.C. 1255 and precluded from granting adjustment or permanent residence to alien crewmen?

STATUTES AND REGULATIONS INVOLVED

Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(7), 79 Stat. 913, provides:

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist of Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opin-

ion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, that immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245 of the Immigration and Nationality Act as amended (8 U.S.C. 1255), provides:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

8 Code of Federal Regulations 235.9 effective March 31, 1966 (31 F.R. 5118) provides in part:

"§ 235.9 Conditional entries.

"(a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

"(c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest Service office outside of the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. * * *"

8 Code of Federal Regulations 245.1(d) provides in part:

"(d) Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).

"* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act as provided in §245.4 unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

8 Code of Federal Regulations 245.4 provides:

"§ 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203 (a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under

the Proviso to section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination." (31 F.R. 536, January 15, 1966.)

STATEMENT OF THE CASE

Petitioner, a native of China, entered the United States as a crewman on June 12, 1963, overstayed and on April 18, 1965, was ordered deported to Taiwan. On May 16, 1966, he filed an application with the District Director of the Immigration Service in New York for refugee status pursuant to 8 U.S.C. 1153(a)(7). At the same time he sought reopening of his deportation case requesting adjustment of his status to that of a permanent resident. His application for refugee status has not been processed or decided. His application for adjustment was denied by the Board of Immigration Appeals on May 25, 1966 (Appendix C) upon the ground that relief was only available under 8 U.S.C. 1255 and that such relief was unavailable to alien crewmen.

Review was sought in the Court of Appeals on May 27, 1966 (R. 28). The Court noted that the statute might have been clearer but that Congress intended to exclude from the refugee preference those (alien crewmen) who could not qualify under 8 U.S.C. 1255 (R. 42). Upon this basis, petitioner's request for judicial review was denied.

REASONS FOR GRANTING THE WRIT

1. For the first time in the history of our immigration laws, Congress enacted permanent refugee legislation on October 3, 1966 [8 U.S.C. 1153(a)(7), 79 Stat. 913]. Prior legislative enactments and practices had been of a temporary character.[1] This litigation, affecting a poten-

[1] For the historical background prior to the Displaced Persons Act of 1948, see *Wasserman, Asylum for the Displaced - A Fifth Freedom, Federal Bar Association Journal*; January, 1948. In 1948 Congress enacted the Displaced Persons Act (62 Stat. 1009,

tial 10,200[2] refugees annually [8 U.S.C. 1153(a)(7)] seeks an interpretation of the statute which the Court below acknowledged might have been written in clearer language (R. 42).[3]

Our quota limitations spell out seven categories of preferences for aliens [8 U.S.C. 1153(a)]. Each of the first six preferences are available to aliens within and outside the United States.[4] Applications are filed with District Directors of the Immigration Service in the United States or abroad.[5] The statute reserves the seventh preference for refugees who have fled Communism, persecution, or catastrophic natural calamities. It requires that applications for such preference be filed with the Immigration Service "in any non-Communist or non-Communist dominated country." By regulation, 8 C.F.R. 235.9 (31 F.R. 5118), the Attorney General adds and reads

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64 Stat. 219). The Refugee Relief Act of 1953 (67 Stat. 400) followed. In 1960 legislation authorized the admission of a limited number of refugees-escapees under the mandate of the United Nations High Commissioner for Refugees (74 Stat. 504).

After 1956 Hungarian refugees from Communism were paroled into the United States pursuant to 8 U.S.C. 1182(d)(5). See: *Application of Paktorovics*, 156 F. Supp. 813 (S.D.N.Y., 1957). Chinese refugees in Hong Kong and Cuban refugees have been accorded similar privileges, 1 *Gordon and Rosenfield, Immigration Law and Procedure*, pp. 6-36, 37 (1966).

[2] 8 U.S.C. 1153(a)(7) makes available up to 6% of the 170,000 annual quota numbers or 10,200 for conditional entrants and one-half of this number, or 5,100 for adjustment of status.

The issues presented herein are similar to those presented in *Tai Mui v. Esperdy* (Sup. Ct. No. 1037) and *Chan Hing and Lai Cho v. Esperdy* (No. 1038) in which petitions were filed on February 7, 1967. Those cases were decided below in a joint opinion with that of petitioner. However, they present jurisdictional questions not involved in the instant case.

[3] The statute has been characterized as "somewhat ambiguous". 2 *Gordon and Rosenfield*; *supra*, pp. 7-78.

[4] The first six preferences are reserved for relatives or those possessing certain skills.

[5] 8 C.F.R. 204.1 (December 1, 1965).

into the statute the words "other than the United States" and excludes applications for seventh preference in the United States. Under the regulations only those who are in Austria, Belgium, France, Germany, Greece, Italy and Lebanon may apply. The regulations fly in the face of this Court's mandate forbidding amendment by regulations where the enactment is unambiguous. *Koshland v. Helvering*, 298 U.S. 441, 447 (1936). Moreover, they disregard the principle of statutory construction that remedial legislation should be liberally construed. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938); *Do v. Esperdy*, 309 F.2d 467 (2d Cir. 1962); *Sun v. Barber*, 144 F. Supp. 850 (N.D. Calif. 1956).

Whether the regulatory restriction excluding numerous refugees within the United States from the benefits of this preference is valid is an issue which should be decided by this Court.

2. The 1965 statute authorizes the grant of permanent immigrant visas to refugee aliens "who have been in the United States for a period of at least two years prior to application for adjustment of status." The Court below sustained a regulation which precludes such benefits to alien crewmen. The Immigration Service requires that such adjustment application be filed under 8 U.S.C. 1255 which denies adjustment to alien crewmen 8 C.F.R. 245.4.

The history of adjustment enactments and procedures for alien refugees discloses that its benefits have been usually extended to alien crewmen. Under the Displaced Persons Act of 1958 alien crewmen refugees within the United States were permitted to seek adjustment as permanent residents (62 Stat. 1009, 50 U.S.C. App. 1953). Under the Refugee Act of 1953 alien crewmen refugees were granted such adjustment [67 Stat. 400, 50 U.S.C. App. 1971(d)]. Adjustment was not channeled and limited to Section 245 (8 U.S.C. 1255). Hungarian (72 Stat. 419) and Cuban refugees (Public Law 89-732, 80 Stat. 1161), are likewise outside the operation of Section 245. The historical background, since the very inception of Section

245 has been to take refugees outside its operation and to accord them special treatment. *2 Gordon and Rosenfield, Immigration Law and Practice (1966)*, pp. 7-75.

In the grant of adjustment under Section 245, a quota number is deducted. No immigration visa is issued. Under the 1965 statute there is specific provision for making immigration visas available to those who qualify for adjustment. This clearly points to a procedure outside section 245. Refugees admitted as conditional entrants under 8 U.S.C. 1153(a)(7) are not required to pursue Section 245 adjustment. "The statute provides for a procedure which simulates the initial entry process," *2 Gordon and Rosenfield, supra*, pp. 7-77. Congress surely did not provide in the same section [8 U.S.C. 1153(a)(7)] for two types of adjustment, one outside Section 245 for refugees classified as conditional entrants, and one within Section 245 for other refugees. On the contrary, it was stated that Congress desired to conform to practices under the Fair Share Refugee Act (Act of July 14, 1960, 74 Stat. 504). *House Report* 745, 89th Cong., 1st Sess., p. 15. *Senate Report* 748, 89th Cong., 1st Sess., p. 16.

In the cases under the Fair Share Refugee Act and in the instant case, two years' presence in the United States is required, a provision not incorporated in Section 245. And in these cases the limitation of Section 245 barring alien crewmen is removed. Finally, it should be noted that if conditional entrants alone are eligible for adjustment outside Section 245, petitioner seeks by his administrative applications herein to be so designated.

The Court below sought support in the legislative history of the 1965 Act, noting, however, that such history was not too persuasive (R. 43). *Senate Report* 748, p. 22, observes that "It is contemplated that such adjustments will be made under Section 245." This was at a time when the legislative proposal was to grant such relief to alien crewmen. (*Senate Report* 748, *supra*, p. 20.) There was no concurrence upon this contemplated procedure or upon

the proposal to grant Section 245 benefits to crewmen by the House of Representatives. On the contrary, the section by section analysis by the House of Representatives Committee contains identical language as the Senate Report but it specifically omits the statement that adjustment will be made under Section 245 (*House Report* 745, *supra*, p. 22). This omission points to a conflict in interpretation by coordinate branches of Congress.[6] Upon this ambiguous history, the Court below resolved remedial statutory language strictly rather than liberally, contrary to *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938), *Do v. Esperdy*, 309 F.2d 467 (2d Cir. 1962).

Whether refugee alien crewmen who have been in the United States for two years may apply for adjustment or whether Congress has denied them the benefits of this ameliatory legislation is an issue which merits this Court's attention.

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

Respectfully submitted,

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[6] The presence of the statement in the Senate Report and not in the House Report is an argument against reading it as implied by the House Committee. See *United States v. Atchison T. & S.F.R. Co.*, 220 U.S. 37 (1910).

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 133, 162 and 154—September Term, 1966.

(Argued November 2, 1966 Decided December 9, 1966.)

Docket Nos. 30621, 30622 and 30552

TAI MUI,

Plaintiff-Appellant,

—v.—

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant-Appellee.

CHAN HING and LAI CHO,

Plaintiffs-Appellants,

—v.—

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,

Defendant-Appellee.

WOO CHENG HWA,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

FRIENDLY, SMITH and FEINBERG,
Circuit Judges.

Appeals from orders of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, granting motions of the INS District Director for summary judgment in actions by aliens seeking declarations that they are entitled to immigrant visas or conditional entries under §203(a)(7) of the Immigration and Nationality Act and stays of deportation pending further proceedings; and petition for review of an order of the Board of Immigration Appeals sustaining a Special Inquiry Officer's refusal to reopen a final order of deportation in order to permit an alien to apply for adjustment of status as a preference immigrant under §203(a)(7). Orders affirmed; petition for review denied.

JULES E. COVEN (Lebenkoff & Coven, New York, N. Y.) (Abraham Lebenkoff, of Counsel), *for Appellants Tai Mui, Chan Hing and Lai Cho.*

MARTIN BURROUGHS (Andrew Reiner, New York, N. Y.), *for Petitioner Woo Cheng Hwa.*

FRANCIS J. LYONS (Robert M. Morgenthau, United States Attorney for the Southern District of New York) (James G. Greilsheimer, Special Assistant United States Attorney, of Counsel), *for Appellee and Respondent.*

FRIENDLY, *Circuit Judge*:

These cases present questions, of first impression for us, of the interpretation of the provisions of the Immigration and Nationality Act Amendments of 1965, 79 Stat. 911, 912-13, according certain refugees preferences for lawful admission.

I.

The 1965 statute had "as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of U. S. citizens and aliens lawfully admitted for permanent residence, to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled alien laborers who are needed in the United States, and to certain refugees." S. Rep. No. 748, 89th Cong., 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3329-30. Section 201(a) as amended now provides that, subject to exceptions not here material, "the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence" shall not exceed 170,000 in any fiscal year. Section 203 lists seven categories of aliens subject to these numerical limitations who are entitled to preferences. The first six of these, entitled in the aggregate to 94% of the 170,000 total, are to receive visas from United States consular representatives abroad. Section 203(a)(7) dealing with refugees, with which we are here concerned, establishes a different procedure for the remaining 6%, or 10,200 per year. It prescribes that "Conditional entries shall next be made available by the Attor-

ney General, pursuant to such regulations as he may prescribe . . . to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country" that they come within the statutory definition of refugee, *"Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

The further handling of an alien who conditionally entered under §203(a)(7) was prescribed in §203(g) and (h). After two years presence, if his conditional entry has not been terminated by the Attorney General and he has not established permanent residence, he must return to the INS for inspection and examination and is dealt with as any other qualified immigrant except that he is excused from the possession of documents required by §212(a)(20). The 1965 Act made only unimportant amendments to §245, the provision of the Immigration and Nationality Act dealing generally with the adjustment of status of a nonimmigrant to that of a person admitted for permanent residence. Subsection (a) provides:

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3)

an immigrant visa is immediately available to him at the time his application is approved."

Subsection (b) directs that upon the approval of an application for adjustment under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence and the Secretary of State shall reduce by one the number of preference or nonpreference visas authorized by §203(a) "within the class to which the alien is chargeable, for the fiscal year then current."

The Attorney General issued revised regulations to implement §203(a)(7). Those pertinent to conditional entry are 8 C. F. R. §235.9(a) and (c), 31 F. R. 5118 (1966):

"§235.9 Conditional entries.

"(a) *Countries in which applications may be filed.* Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act, in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

"(b) • • •

"(c) *Application.* A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form 1-590 to the officer in charge of the nearest Service office outside the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of

age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. • • • The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. • • • "

Those relevant to the adjustment of status proviso are a portion of 8 C. F. R. §245.1(d), 31 F. R. 535 (1966):

"(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*

" • • • An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

and §245.4, 31 F. R. 536 (1966):

"§245.4 *Adjustment of status under the proviso to section 203(a)(7) of the Act.*

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States.

An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203 (a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination." [31 F. R. 536, January 15, 1966].

II.

Tai Mui had last entered the United States as a crewman on July 31, 1961. He was ordered to be deported to Hong Kong and was scheduled to exercise his privilege of voluntary departure on or before November 1, 1965. After failing to depart and being directed to surrender for deportation, he applied to the New York District Director for a stay of deportation under 8 C. F. R. §243.4 in order to prosecute an application for adjustment of status under the amended act. The Director denied the application on the basis that §245 of the Act and 8 C. F. R. §245.1 rendered a crewman ineligible to avail himself of the proviso to §203(a)(7) as a preliminary step to adjusting his status. Tai Mui thereupon sued the District Director in the District Court for the Southern District of New York for a judgment declaring that his being a crewman did not deprive him of the benefits of the proviso to §203(a)(7), that the regulations making him ineligible for such relief on that basis are void, and that a stay of deportation should be granted pending final determination of an application for adjustment of status pursuant to such declaration. Holding that the district court was not deprived of jurisdiction by

§106(a) of the Immigration and Nationality Act vesting the courts of appeals with exclusive jurisdiction for review "of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act," Judge Levet sustained the District Director on the merits and granted summary judgment dismissing the complaint, from which Tai Mui appeals.

Chan Hing and Lai Cho, also crewmen, were ordered to be deported to Hong Kong and were given until October 1965 to effect voluntary departure. Having been commanded to surrender for deportation, they applied to the New York District Director for a stay of deportation until their applications for refugee classification under §203(a)(7) were adjudicated. Admittedly they did not qualify under the two-year requirement of the proviso, since Lai Cho's last entry was on December 11, 1964, and Chan Hing's on April 11, 1965. They contended that, nevertheless, they would be entitled to conditional entry if they could satisfy an INS officer in the United States, concededly a "non-Communist or non-Communist-dominated country," of their refugee status, and that they could then proceed to some other country from which they would enter the United States; or, if this contention should not be accepted, that the Attorney General abused his discretion by failing to place officers of the INS in some country in the Far East where Chinese would stand a better chance of gaining temporary admission for the purpose of making an application. When the District Director denied their applications, they too sued in the District Court for the Southern District of New York for a declaratory judgment of the invalidity of the regulations and their entitlement to a stay. In their case also Judge Levet held the district court had

jurisdiction but dismissed the complaint on the merits, and they appeal.

Woo Cheng Hwa entered the United States as a crewman in June 1963 and was ordered in 1965 to be deported to the Republic of China on Taiwan, being given until April 1, 1966 to depart voluntarily. Having been directed to surrender for deportation, he moved to reopen the deportation proceedings to adjust his status to that of a permanent resident, contending that he was entitled to this relief by reason of the proviso to §203(a)(7) despite his lack of the refugee classification approved by the District Director required by 8 C. F. R. §245.1(d). Denial by a Special Inquiry Officer and dismissal of his appeal by the Board of Immigration Appeals followed in short order. He here seeks review under §106(a).

III.

We must first consider whether the District Court had power to entertain the declaratory judgment actions brought by Tai Mui and by Chan Hing and Lai Cho. The Government concedes it had jurisdiction over the latter but denies it had this in the former, although believing the initial handling of both types of cases by the district court to be preferable from an administrative standpoint.

We readily agree that the district court had jurisdiction over the action brought against the District Director by Chan Hing and Lai Cho. The statute makes the jurisdiction of the courts of appeals exclusive only as regards "the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act." The action did not challenge the deportation orders, and the District Director's refusals of stays under 8 C. F. R. §243.4, which are all it did challenge, were

not made pursuant to administrative proceedings under §242(b). Jurisdiction of the district court is in no way foreclosed by the construction given the statute in *Foti* v. *INS*, 375 U. S. 217 (1963). The Supreme Court there decided that the statutory language covered "a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding," 375 U. S. at 224, a view reinforced by the consideration that "the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order, and discretionary relief, if sought, must be requested prior to or during the deportation hearing," 375 U. S. at 223, all under §242(b) to which the statute vesting exclusive jurisdiction in the courts of appeals expressly refers. Neither is district court jurisdiction precluded by the later *per curiam* in *Giova* v. *Rosenberg*, 379 U. S. 18 (1964), settling in the affirmative what the Court had characterized in *Foti* as the "somewhat different" question "whether §106(a) extends the exclusive jurisdiction of the Courts of Appeals to include review of orders refusing to reopen deportation proceedings." 375 U. S. at 232. Examination of the record in that case shows that the Board of Immigration Appeals had entertained Giova's motion to reopen the deportation proceeding to grant him a waiver of a ground of excludability provided in §212(g) of the Immigration and Nationality Act or in the alternative for suspension of deportation under §244; its denial of the motion was thus a part of the deportation proceeding itself. *Foti* and *Giova* do not place within the scope of §106 determinations, such as the one involved here, which do not attack the deportation order itself but instead seek relief not inconsistent with it. Chan Hing and Lai Cho have made no

motions to reopen their deportation proceedings and there was no basis on which they could have done so. Rather, their objective was to obtain "conditional entry" which would allow them to depart from the United States, hopefully to some nearby country, with the assurance that they could immediately make a lawful entry or, failing that, to be allowed to remain here until the INS opened an office to handle conditional entry applications at some country in the Orient to which they would voluntarily depart.

The Supreme Court's decisions do not demand or even justify our recasting §106(a) so as to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might affect the deportation of aliens, subject only to the recognized exception for habeas corpus; if Congress had wanted to go that far, presumably it would have known how to say so. We recognize that the Seventh Circuit has taken or at least come close to taking this position, see *Roumeliotis* v. *INS*, 304 F. 2d 453, cert. denied, 371 U. S. 921 (1962) [denial of first preference visa and stay of deportation]; *Skiftos* v. *INS*, 332 F. 2d 203 (1964) [denial of first preference visa]; *Melone* v. *INS*, 355 F. 2d 533 (1966) [denial of stay of deportation in order to visit brother confined in mental hospital], and we appreciate that such a view has the merit of avoiding sterile jurisdictional controversy. But we do not feel warranted in going so far beyond the words that Congress used; indeed, we are already committed against any such broad position. *Lam Tat Sin* v. *Esperdy*, 227 F. Supp. 482, 484 & n. 2 (S. D. N. Y.), aff'd without discussion of the point, 334 F. 2d 999 (2 Cir.), cert. denied, 379 U. S. 901 (1964). See also *Samala* v. *INS*, 336 F. 2d 7, 12-13 (5 Cir. 1964); *Mendez* v. *Major*, 340 F. 2d 128 (8 Cir. 1965). On the precise point here at issue we follow Judge Coolahan's

convincing opinion in *Cheng Ho Mui and Pun Yi Pan* v. *Rinaldi*, Civ. No. 368-66, D. N. J. (1966).

Although these same considerations would seem on their face to settle the jurisdictional issue in Tai Mui's action since he also has never moved to reopen the deportation order or conducted any proceedings under §242(b), the Government says his case is different because he ought to have followed that route, as Woo Cheng Hwa did.[1] It contends he should have moved to reopen the deportation proceeding for an adjustment of his status despite the Attorney General's regulations, binding upon the Special Inquiry Officer and the Board of Immigration Appeals,[2] which declare ineligible for adjustment of status an alien lacking a refugee classification approved by the District Director whose determination is expressly immunized from review, and the consequent futility of such a motion at the administrative level.

While the jurisdictional question in Tai Mui's case is much closer than in Chan Hing's and Lai Cho's, the Government's contention would take us too far from the statutory language and purpose, and would make the statute something of a trap. Faced with a regulation which barred an application for reopening the deportation order to adjust status in the absence of a classification approved by the District Director and with a refusal by the latter not subject to administrative appeal, Tai Mui's lawyer did

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1 8 C. F. R. §245.2 provides that an application by an alien for adjustment of status "after he has been served with an order to show cause or warrant of arrest shall be made and considered only in proceedings under Part 242 of this chapter."

2 Since the Board exists only by virtue of the Attorney General's regulations, 8 C. F. R. Part 3, it naturally regards itself as bound by them in all respects and will not consider challenges to their validity. *Matter of Teimas*, 10 I. & N. Dec. 101 (1962); see Gordon and Rosenfield, Immigration Law and Procedure §1.10 at 1-50, 1-59 (1966).

what most attorneys would have regarded as the natural and sensible thing to do; he attempted to remove the roadblock by obtaining a court order that the District Director must consider Tai Mui's application on its merits and without regard to his being a crewman, just as if Tai Mui had sought to regularize status before becoming subject to an order of deportation. Reading 8 C. F. R. §245.2 in the context of the other provisions applicable in this situation, especially 8 C. F. R. §§245.1(d), 245.4, we hold that Tai Mui was not required to go through the motions of requesting to be heard by a Special Inquiry Officer and then appealing to the Board of Immigration Appeals, but was entitled to challenge the District Director's administratively unreviewable refusal in the district court. A different case would be presented if the Attorney General were to place determinations pursuant to the proviso of §203(a)(7) under the aegis of Special Inquiry Officers with appeals to the Board of Immigration Appeals, see *Foti* v. *INS*, *supra*, 375 U. S. at 230 n. 16.[3]

IV.

The substantive question raised by Tai Mui's appeal and Woo Cheng Hwa's petition for review is whether the proviso to §203(a)(7) permitting up to 5100 visas a year to "be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least

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3 These cases point up the desirability of Congress' clarifying this needlessly murky piece of legislation and rescuing lawyers and judges from the fruitless jurisdictional disputes that will continue to plague them until it does, as the writer predicted some years ago. The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Col. L. Rev. 787, 795-96 (1963). Such legislation could well be preceded by an inquiry whether the 1961 Act is producing the expedition that was contemplated.

two years prior to application for adjustment of status" incorporates the limitation of §245 making adjustment of status thereunder unavailable to an alien crewman, or—perhaps more accurately—whether the Attorney General by regulation may so provide. We answer in the affirmative.

While the proviso would have been clearer if language such as "eligible for adjustment of status under the provisions of this Act," had been inserted after "aliens," we are satisfied Congress intended to accord the preference only to aliens who were entitled to have their status adjusted under existing law rather than to direct the Attorney General to create by regulation a new category for the adjustment of the status of other aliens. In this way Congress excluded from the preference, so far as concerns those who could not qualify under some section other than §245, aliens who had entered illegally and alien crewmen, a group it had characterized as guilty of "frequent abuses of the immigration laws." H. R. Rep. No. 2088, 86th Cong. 2d Sess., 2 (1960). That the same 1965 act which included §203(a)(7) amended §244 to eliminate the ban on alien crewmen adjusting their status under the far more stringent residence and other requirements of that section while leaving intact the corresponding exclusion in §245, works against Tai Mui and Woo Cheng Hwa rather than for them. The Senate Committee, in recommending the change in §244, carefully said it felt "no distinction should be made in the treatment of aliens because of their manner of entry where they meet the other conditions which would qualify them for that form of discretionary relief." S. Rep. No. 748, 89th Cong. 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3328, 3339. Moreover, the portion of the Senate Report dealing with §203(a)(7), after explaining that the proviso permits 5100 of the numbers authorized for refugees to "be used in lieu

of conditional entries to adjust the status of refugees who have been physically present in the United States for 2 years," went on to say, "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." *Id.* at 3341. Although such a gloss is less compelling than if it had been made in connection with a Senate amendment or were a statement in the reports of both houses or of a conference committee, it is entitled to weight nevertheless, see *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 42-43 (1946)—surely as much as floor discussion in one house of an earlier Congress, see *Foti* v. *INS*, *supra*, 375 U. S. at 223-24. Reliance on such an expression is not "an attempted addition to the statute of something which is not there," *C. I. R.* v. *Acker*, 361 U. S. 87, 93-94 (1959); with §203(a)(7) susceptible of either of two constructions, the Senate Report confirms that the members of one house of Congress who were most knowledgeable on the subject and the others who read their report considered the bill to have the meaning we would have thought the more likely in any event. The construction urged by the Government leads to no absurd or unfair results; exclusion of alien crewmen from the preference accorded by §203(a)(7) simply improves the chance of others whom Congress could well have deemed to be more deserving.

V.

As indicated, Chan Hing's and Lai Cho's position is that the regulations dealing with conditional entries, 8 C. F. R. §235.9, are invalid for failure to list the United States as a non-Communist or non-Communist-dominated country where an alien may apply, be examined, and be granted a conditional entry with the consequent feasibility of his departure to another country from which he can enter the

United States. At the very least, the plaintiffs contend, the regulations are arbitrary in listing only countries in Europe and the Middle East[4] and excluding any in the Orient as places where applicants may be examined.

The first branch of the argument is quite unpersuasive. The natural reading of §203(a)(7) is that it accorded preference to two categories of refugees, those who were abroad and were seeking entry into the United States, and those who had already been here for two years. The "conditional entry" device was designed for the first group, the procedure of making a visa available in lieu of a conditional entry was intended for the second, and the obvious *casus omissus*—refugees here for less than two years—simply did not fall within the preferential scheme. If Congress had intended that refugees within this country not qualifying under the proviso for lack of two years residence should nevertheless be entitled to obtain in the United States the same treatment as those seeking entry from abroad, it would have found some way of saying this less awkward and susceptible to misinterpretation than including the United States under the rubric of "any non-Communist or non-Communist-dominated country." Furthermore, the House and Senate Committees said that the conditional entry procedure was "not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same," the new term having been developed in order to avoid "a connotation unfavorable to the alien." H. R. Rep. No. 745 at 15, and S. Rep. No. 748

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4 Cuban and other western hemisphere refugees are not affected by this since they are "special immigrants" under §101(a)(27) who are not subject to the numerical limitation of §203 by express provision of §201(a). See Gordon and Rosenfield, Immigration Law and Procedure §§2.17, 2.20 (1966).

at 17, 89th Cong. 1st Sess. (1965), the latter reprinted in 1965 U. S. Code Cong. & Adm. News 3328, 3335. That statute had provided that the Attorney General "may parole into the United States, pursuant to such regulations as he may prescribe" an alien refugee-escapee who "(1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied . . . ," 74 Stat. 504 (1960). The regulations promulgated by the Attorney General pursuant to this grant of authority were nearly identical with those challenged by petitioners here, permitting application for parole to be made only to "the nearest office of the Service *in Europe*," which applications were to be approved "by an officer in charge *outside the United States*." 8 C. F. R. §212.5 (1965) (emphasis added).[5] If we would otherwise have had any doubts as to the consistency of 8 C. F. R. §235.9 with congressional intent, this would resolve them.

Turning to the second branch of the argument, namely, that the regulation is invalid for failure to designate an office in the Far East, we encounter the difficulty that even if we thought the claim well-founded, we could hardly direct the Attorney General to supply the office the plaintiffs want. The only recourse open to the courts would thus appear to be to stay deportation of all Chinese refu-

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5 "*Parole of aliens into the United States.* * * *

(b) *Refugee-escapees.* A separate application for parole as a refugee-escapee under section 1 of the Act of July 14, 1960, shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest office of the Service in Europe . . . . The approval of an application for parole under section 1 of the Act of July 14, 1960, by an officer in charge outside the United States authorizes the district director at a port of entry to parole the applicant upon arrival at such port within six months after the date of authorization. . . . " 8 C. F. R. §212.5 (1965).

gees who seek conditional entries until such an office was established or, for those who were eligible, they met the two year test of the proviso—strong medicine, indeed. Before seriously considering any such confrontation with the executive branch, we would require far weightier evidence of arbitrary action than has been presented. A letter from the Legal Adviser of the Department of State to the Assistant Attorney General in charge of the Criminal Division explains:

> "Under the Act of July 14, 1960, commonly referred to as the 'Fair Share' refugee law, the examination of refugees who made application for parole was limited to seven countries, namely, Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement reached with the Department of State, to the presence of United States immigration officers within their respective territories for the purpose of examining applicants for parole into this country as refugees, and also to the return to such country within a period of two years of any refugees found to be statutorily inadmissible into the United States. The Congress was aware of these arrangements when it enacted Section 203(a)(7) of Public Law 89-236, and, at the same time, repealed Sections 1, 2 and 11 of the Act of July 4, 1960 . . . . Consequently, the former procedures have been continued in force to facilitate the conditional entry of refugees under Section 203(a)(7). The Secretary of State and the Attorney General have agreed, however, that if it should develop later that any changes in these procedures are desirable, they will be promptly effected upon agreement between the Department of State and the Department of Justice."

Figures for the fiscal year 1966 presented by the Special Assistant United States Attorney show that while of the 3191 aliens who were found qualified for conditional entry in the fiscal year ending June 30, 1966 only five were Chinese, the bulk of aliens adjusted to the status of permanent residents under the proviso were Chinese—3576 out of 4009—so that nearly half the aliens benefiting from the seventh category of preference have been Chinese. While it appears to be true that these were for the most part Chinese who had been admitted under the Hong Kong refugee program before enactment of the 1965 amendments, there is surely no indication that any discrimination against Chinese refugees has been practiced up to this time.

The orders of Judge Levet dismissing the complaints of Tai Mui and of Chan Hing and Lai Cho are affirmed; Woo Cheng Hwa's petition for review is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court Couse, in the City of New York, on the ninth day of December, one thousand nine hundred and sixty-six.

Present: HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

Woo Cheng Hwa,

Petitioner,

v.

Immigration and Naturalization Service,

Respondent.

A petition for review of an order of the Board of Immigration Appeals.

This cause came on to be heard on the Administrative record of the Immigration and Naturalization Service, and was argued by counsel.

In consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX C

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

MAY 25 1966

File: A-15309095 - New York

In re: CHENG HWA WOO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Andrew Reiner, Esquire
Reiner & Kaufman
170 Broadway
New York, New York
10038

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Remained longer, crewman

Lodged: None

APPLICATION: Reopening for adjustment of status under Section 245 of the I&N Act as a preference immigrant under Section 203(a)(7) of the Act of October 3, 1965

The case comes forward on appeal from an order entered by the special inquiry officer on May 17, 1966 denying the respondent's motion requesting reopening of the proceedings so that he may apply for adjustment of status under Section 245 of the Immigration and Nationality Act as a preference immigrant pursuant to the provisions of Section 203(a)(7) of the Immigration and Nationality Act as amended by Public Law 89-236, approved October 3, 1965. The respondent, a 47-year-old married male, native of China and citizen of the Republic of China on Tai-

wan, has resided continuously in the United States since his admission as a nonimmigrant crewman at Philadelphia, Pennsylvania on or about June 12, 1963 at which time he was authorized to remain in the United States in such status for the period of time his vessel remained in port but in no event to exceed 29 days. He remained beyond the period authorized. Deportation proceedings were instituted against him on October 11, 1965.

A hearing in deportation proceedings was held at New York, New York on October 12, 1965 at which time respondent was represented by other counsel. Counsel at the deportation hearing and the respondent admitted the truth of the factual allegations set forth in the Order to Show Cause and conceded deportability on the charge stated therein. Upon conclusion of the deportation hearing the special inquiry officer accorded the respondent permission to depart voluntarily from the United States, in lieu of deportation, and directed that if he failed to depart when and as required that he be deported from the United States to the Republic of China on Taiwan on the charge set forth in the Order to Show Cause. The respondent failed to depart in accordance with the order entered by the special inquiry officer on October 12, 1965 and on April 18, 1966 a warrant was issued for his deportation from the United States on the charge designated above.

The points raised by counsel on appeal lack merit. Counsel's argument that the special inquiry officer's denial of the motion to reopen was arbitrary, capricious or contrary to law is without merit. The respondent is not eligible for the benefits of Section 245 of the Immigration and Nationality Act since he entered the United States as a crewman. Section 245 of the Immigration and Nationality Act provides that the status of an alien, other than alien crewmen, who is inspected, admitted or paroled into the United States may be adjusted by the Attorney General, * * *. 8 CFR 245.1, provides that an alien upon arrival in the United States who is serving in any capacity

aboard a vessel or aircraft, * * *, or who was not admitted or paroled following inspection by an immigrant officer is not eligible for the benefits of Section 245 of the Immigration and Nationality Act.

After carefully considering all the evidence of record together with the exceptions noted on appeal, we must, for the reasons hereinbefore set forth, affirm the special inquiry officer's decision denying the motion to reopen. Accordingly, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

Chairman

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1037

TAI MUI, PETITIONER

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE DISTRICT OF NEW YORK

No. 1038

CHAN HING AND LAI CHO, PETITIONERS

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE DISTRICT OF NEW YORK

No. 1090

WOO CHENG HWA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are citizens of the Republic of China in Formosa who entered the United States as alien crew-

men, overstayed their leave, were granted the privilege of voluntary departure in deportation proceedings, and were ordered deported after they failed voluntarily to depart. Each of them then applied to have his deportation order stayed or reopened on the ground that he wished to apply for relief as a refugee from a "Communist or Communist-dominated * * * area" (mainland China) under Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. (Supp. I) 1153 (a)(7).[1] Each was found ineligible for the relief sought; those determinations were upheld by the court below, which issued a single opinion (371 F. 2d 772) in the three cases.

Petitioners in No. 1037 and 1090 seek to be classified as refugees under Section 203(a)(7) and to have their status adjusted, without leaving this country, to that of lawful permanent residents; petitioners in No. 1038, not having been in this country for two years as required by Section 203(a)(7), seek to have processed, before they are deported, applications for classification as refugees, so that they might later more easily obtain admission to the United States as conditional entrants under that section. Each attacks the regu-

[1] Petitioners in No. 1037 and 1038 sought relief by way of an application for a stay of deportation. Petitioner in No. 1090 moved to reopen the deportation proceeding. After administrative relief was denied, petitioners in No. 1037 and 1038 commenced actions for a declaratory judgment in the United States District Court for the Southern District of New York. Unsuccessful there, they appealed to the court of appeals. Petitioner in No. 1090 filed a petition for review in the court of appeals of the Board of Immigration Appeals' decision, pursuant to Section 106a of the Immigration and Nationality Act. See note 10, *infra*. We have lodged with the Clerk of the Court the administrative file in the three cases.

lations adopted by the Attorney General pursuant to Section 203(a)(7). We answer the three petitions together, first setting forth the statutory scheme, and then discussing in more detail the two principal contentions of the petitioners.

1. The statutory provisions here involved are part of legislation enacted in 1965, 79 Stat. 911, *et seq.*, designed primarily to abolish the national origins quota system for the allocation of immigrant visas, and to substitute therefor a new system based upon preferences that accord priorities in the issuance of immigrant visas to various specified classes of aliens. See S. Rep. No. 748, 89th Cong., 1st Sess., 11; H. Rep. No. 745, 89th Cong., 1st Sess., 11–13. Section 201(a) of the Act, as amended, 8 U.S.C. (Supp. I) 1151(a), provides that "the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence * * * shall not in any fiscal year exceed a total of 170,000." Section 202(a) of the amended Act, 8 U.S.C. (Supp. I) 1152(a), provides, *inter alia,* that in any fiscal year no more than 20,000 natives of any single country shall be admitted, and establishes a scheme of preferences in Section 203(a)(1) through (7) of the amended Act, 8 U.S.C. (Supp. I) 1153(a)(1)–(7). In that section, the first, second, fourth and fifth preferences (amounting to seventy-four percent of the quota) are allocated to various classes of relatives of United States citizens or aliens admitted for permanent residence; third preference (ten percent of the quota) is accorded to members of the professions, or to scientists and artists who will

substantially benefit the United States; sixth preference (ten percent of the quota) is granted to alien workers, skilled or unskilled, for whose labor a shortage exists in the United States. The seventh preference (Section 203(a)(7), 8 U.S.C. (Supp. I) 1153(a)(7)), amounting to six percent of the total or 10,200 persons, is set aside for refugees; it provides:

> Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe * * * to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made * * * [2]
>
> *Provided:* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

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[2] In matter omitted as irrelevant here, the section goes on to provide for preferences to refugees from the Middle East and persons "uprooted by catastrophic natural calamity."

The Attorney General by regulation, 8 C.F.R. 235.9 (Appendix, *infra*, pp. 15–16) has provided that applications for conditional entry under the first part of this subsection may be made only in Austria, Belgium, France, Germany, Greece, Italy and Lebanon. By further regulation, 8 C.F.R. 245.4 (Appendix, *infra*, pp. 16–17), he has provided that the terms of Section 245 of the Act, 8 U.S.C. 1255 (Appendix, *infra*, p. 15)—the general adjustment of status provision—"shall govern the adjustment of status provided for in the proviso."

2. Petitioners in Nos. 1037 and 1090 contend that the proviso to the seventh preference section, Section 203(a)(7) of the Act (quoted above), which speaks of "adjustment of status," was not intended to incorporate the provisions of Section 245 of the Act, which deals generally with adjustment of status and which explicitly denies to alien crewmen that discretionary relief. They argue that the regulation, insofar as it interprets the statute as making Section 245 applicable to refugees under Section 203(a)(7), is invalid, and that since the latter provision alone does not bar relief to alien crewmen, they are eligible for its benefits.

The court below was correct, however, in reasoning that Congress, in passing Section 203(a)(7), did not thereby intend to benefit alien crewmen, otherwise prohibited from adjusting their status under Section 245, by providing an independent avenue for the adjustment of their status. As the court noted (371 F. 2d at 778–779), the legislative history of Section 203(a)(7) shows that Congress intended that applica-

tions for relief thereunder be made pursuant to the adjustment of status provision of Section 245. Indeed, the Senate Report states categorically that "[i]t is contemplated that such adjustments will be made under Section 245 of the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess., 22.[3]

Moreover, textual analysis supports the conclusion that adjustment of an alien's status upon his reclassification as a refugee under Section 203(a)(7) must be accomplished under Section 245. Section 203 purports to do no more than establish a preferential system for the allocation of immigrant visas under the world-wide quota (170,000 persons), and in the proviso to subsection (a)(7) does no more than make available to refugees a limited number of seventh

[3] Much is made of the fact that no similar statement appears in the House Report; see Pet. No. 1090, pp. 8-9. It is obvious, however, that the failure of that report (H. Rep. No. 745, 89th Cong., 1st Sess.) to contain a similar declaration does not indicate disapproval of, or disagreement with, the Senate position. We note also that Congressman Feighan, Chairman of the House Sub-committee on Immigration and Nationality and one of the chief architects of the 1965 Act, has recently indicated that it is and was his understanding that Section 203(a)(7) incorporates the provisions of Section 245 for applications of adjustment of status under the former section's proviso. In commenting this past June on the changes which the 1965 Act has made in the bill that he had originally offered, Congressman Feighan stated:

> Other provisions of my bill which were subsequently modified were * * * the eligibility for Section 245 adjustment for those who entered as crewman (the final bill barred crewman, including potential 203(a)(7) refugees, from that privilege).

The text of this speech is printed in Vol. XIX, Immigration Bar Bull., No. 1, pp. 3-4 (Jan.-June 1966), and reprinted in 112 Cong. Rec. 13958-13959 (Daily ed., June 29, 1966).

preference visas to satisfy the "visa availability" requirement for adjustment of status under Section 245; in other words, it clearly does not establish any separately available avenue of relief. Thus, while the words "adjustment of status" appear in the proviso to Section 203(a)(7), they merely convey one of the requisites of eligibility for a preferential visa under the section—a time requirement—namely, that in order to be eligible for an immigrant visa in lieu of conditional entry, a refugee already present in this country must "have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status." The proviso spells out no procedural avenue for obtaining relief, unlike every independent relief provision of the Act—*e.g.*, Section 244, 8 U.S.C. 1254 (suspension of deportation); Section 245, 8 U.S.C. 1255 (adjustment of status); Section 249, 8 U.S.C. 1259 (award of permanent resident status to certain aliens); and Section 212(e), 8 U.S.C. 1182(e) (waiver of foreign residence requirement for exchange visitors).[4] Had Congress intended the proviso to Section 203(a)(7) to be a similar independent and self-sustaining relief provision, it would have used similar

[4] Each of the cited sections reads in terms of a grant of authority to the Attorney General to provide the relief specified in his discretion. The sole exception to the statement in the text appears in Section 241(f), 8 U.S.C. 1251(f), which provides for waiver of deportation for aliens, with certain close relatives in the United States, who entered the country through a misrepresentation (see *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214). However, that section, unlike other relief provisions of the Act, is of automatic effect, once the alien comes within the defined class.

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specific language to that of those sections. Accordingly, it seems clear that Congress intended the proviso to refer to the general adjustment of status provision, Section 245.

Further support for the interpretation of the proviso to Section 203(a)(7) by the Attorney General and the court below is found in Congress' precise enactments regarding alien crewmen, the class in which all petitioners fall. In 1960 alien crewmen were excluded from adjustment of status benefits under Section 245 because of "frequent abuses of the immigration laws by deserting seamen." H. Rep. No. 2088, 86th Cong., 2d Sess., 2. This provision "codifie[d] an enforcement policy usually followed under earlier versions of this statute." Gordon and Rosenfield, *Immigration Law and Procedure* 7–59 (1966). It is hardly likely that Congress would have significantly changed the strict treatment of alien crewmen under the immigration laws without some more explicit statement in Section 203(a)(7). Moreover, as the court of appeals noted (371 F. 2d at 778), Congress in 1965 was well aware of the special problems posed by alien crewmen. At the same time that it added Section 203(a)(7), Congress amended Section 244 of the Act (8 U.S.C. (Supp. I) 1254) (which had permitted suspension of deportation for aliens other than alien crewmen under more stringent conditions than Section 245), so as to make the benefits of that section available to alien crewmen who had entered the United States prior to June 30, 1964, and had resided in this country for a specified period. See 8 U.S.C. 1254(f); Gordon and Rosenfield, *Immigra-*

tion Law and Procedure 7–91, 7–92 (1966). Congress did not at the same time amend Section 245, and it seems clear that it did not intend to do so indirectly, as to alien crewmen refugees, by the passage of Section 203(a)(7).

In summary, the language of Section 203, its place in the statutory scheme, its legislative history (albeit limited), and the clear congressional policy with respect to alien crewmen show that Section 245's adjustment of status provision is controlling, and hence that petitioners are ineligible for that discretionary relief.

3. Petitioners in Nos. 1038 and 1090 contend that they should have been permitted to process their applications for conditional entry while they are still within this country, at least to the extent of being classified as refugees for the purpose of later seeking conditional entry under Section 203(a)(7).[5] They argue that the regulation (8 C.F.R. 235.9, Appendix, *infra*, pp. 15–16) permitting the filing of such applications only in seven specified countries, implicitly excluding filing in the United States, and in the Far East, where petitioners are to be deported, is invalid. In effect they seek either to have the Attorney General ordered to process their applications before they are deportd, or to have their deportation stayed until the Attorney General should direct immigration officials in the Far East to accept Section 203(a)(7) applications.

[5] Petitioner in No. 1090 makes this contention as an alternative to the primary relief he seeks of adjustment of status (see Pet. 2, 8). Petitioner in No. 1037 apparently does not seek classification as a refugee in this country.

However, as the court of appeals noted (371 F. 2d at 779), Section 203(a)(7) accords quota preferences only to two classes of refugees—those abroad who are seeking entry into the United States (conditional entry) and those already physically in the United States for a minimum period of two years (adjustment of status). Both congressional committees reporting on the provision stated that the conditional entry procedure was not "unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same." H. Rep. No. 745, 89th Cong., 1st Sess. 15; S. Rep. No. 748, 89th Cong., 1st Sess., 16. That statute had provided for parole into the United States, pursuant to such regulations as the Attorney General prescribed, of an alien refugee-escapee who applied "for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied * * *" 74 Stat. 504. The statute was administered under regulations permitting applications for parole to be made only "to the officer in charge of the nearest office of the Service in Europe" and were to be approved by an "officer in charge outside the United States * * *" 8 C.F.R. 212.5(b) (1965).[6] Moreover, under the Fair Share Refugee Act, the examination of refugees who made application for parole was in practice limited to seven countries, namely,

[6] The regulation also required assurances of employment and housing in the United States for a period of two years and assurances of transportation from the applicant's place of abode to point of final destination in the United States.

Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement with the Department of State, to the presence of United States immigration officers within their respective territories for the purpose of examining applicants for parole into the United States as refugees, countries that had also agreed to accepting the return within two years of any refugees found to be statutorily inadmissible to the United States. It was this procedure and arrangement to which Congress made specific reference when it enacted Section 203(a)(7), at the same time repealing the relevant sections of the Fair Share Refugee Act. See H. Rep. No. 745, at 15, *supra,* p. 10; S. Rep. No. 748, at 17, *supra* p. 10. We think it clear, therefore, that Congress contemplated that the conditional entry program under the present law would be of similar design. The regulations governing applications of refugees for conditional entry, which petitioners attack, correspond with the legislative purpose embodied in Section 203(a)(7). Indeed, they are virtually identical with the regulations adopted to govern the parole of refugees into the United States under the former act, to which Congress alluded.[7] In light

[7] Petitioners in No. 1038 and petitioner in No. 1090 contend more specifically that applications for classification as refugees may be made in the United States, notwithstanding 8 C.F.R. 235.9, because the first paragraph of Section 203(a)(7) does not explicitly provide to the contrary. The section states that the examination for conditional entry be before an Immigration official "in any non-Communist or non-Communist dominated country * * *". Petitioners' contention thus requires the strained interpretation that Congress intended to include reference to the United States in the term "any non-Communist or

of this history, the court below was clearly correct in ruling (371 F. 2d at 779–780) that 8 C.F.R. 235.9, limiting applications at this time to refugees in seven named countries, is a proper implementation of the statute.

We believe, further, that petitioners exaggerate the effect of the decision below on the scope of Section 203 (a)(7); it does not render the section nugatory.[8] Indeed, the Immigration Service advises that in the 1966 calendar year 4427 refugees abroad were granted conditional entry, and 5976 alien refugees present in this country were granted adjustment of status, a number exceeding that authorized by the statute for any fiscal year.[9]

Communist dominated country." Although the United States is of course such a country, Congress had no difficulty in using the term "United States" when referring to it. And it did so elsewhere in Section 203(a)(7). Moreover, the contention overlooks the distinction in the section between refugees abroad, for whom conditional entry is designed, and refugees present in this country for two years, to whom the proviso is addressed.

[8] We note also that the Ninth Circuit has recently interpreted Section 203(a)(7) in similar fashion, as "not creat[ing] any new procedure for adjustment of status." See *Wing Wa Lee* v. *Immigration and Naturalization Service*, C.A. 9, No. 21,960, decided March 28, 1967.

[9] Section 203(a)(7) has not been in effect for a full fiscal year; hence, the figures given are for the calendar year 1966. Since only 10,200 refugees may receive preferential status under the section in a fiscal year, it is evident, from the figures above, that more refugees than can be accommodated will apply.

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.[10]

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[10] Petitioners in No. 1037 and 1038 also suggest that this Court should review the issue concerning the jurisdiction of the district court to entertain their action. It is true that there is some confusion concerning the route for judicial review of denial of applications for stays of deportation pending some other administrative action—*i.e.*, whether it must be by way of declaratory judgment in the district court or by way of a petition for review in the court of appeals under the provisions of Section 106a of the Act, 8 U.S.C. 1105a, for review of "final orders of deportation". Compare the instant cases with *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921; *Skiftos* v. *Immigration and Naturalization Service*, 332 F. 2d 203 (C.A. 7); *Malone* v. *Immigration and Naturalization Service*, 355 F. 2d 533 (C.A. 7). However, the court below found the requisite jurisdiction and proceeded to decision on the merits in all three cases. Accordingly, since the jurisdictional issue was decided favorably to petitioners, they are in no position to urge review of that issue.

APPENDIX

Statutes and Regulations Involved

Section 203(a)(7) of the Immigration and Nationality Act, as amended, 8 U.S.C. (Supp I) 1153(a)(7), 79 Stat. 913, provides:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number,

to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

Section 245 of the Immigration and Nationality Act as amended (8 U.S.C. 1255), provides:

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * * * *

8 Code of Federal Regulations 235.9, as amended, effective March 30, 1966 (31 F.R. 5118), provides in part:

§ 235.9 Conditional entries.

(a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

* * * * *

(c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I–590 to the officer in charge

of the nearest Service office outside of the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. * * *

8 Code of Federal Regulations 245.1(d), as amended, 31 F.R. 535–536, January 15, 1966, provides in part:

(d) Immediate relatives under section 201 (b) and preference aliens under section 203(a) (1) through 230(a)(7).

* * * An alien who claims preference status under the provisio to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act as provided in § 245.4, unless the district director has approved the alien's Application for Classification as a Refugee under the Provisio to Section 203(a)(7), Immigration and Nationality Act.

8 Code of Federal Regulations 245.4, as amended, 31 F.R. 536, January 15, 1966, provides:

§ 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States.

An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I–590A, Application for Classification as a Refugee under the Proviso to section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination.

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